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The Case of the Beverly Hotel--A Study of the Judicial Process

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THE CASE OF THE BEVERLY HOTEL — A STUDY OF THE JUDICIAL PROCESS

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I. INTRODUCTION

OUR brethren in the medical profession are accustomed to publishing case histories. The purpose is to confirm diagnoses previously made or to indicate errors in diagnosis or treatment. This type of study depends on the completeness of factual statement for its utility as a guide in future diagnostic or therapeutic effort.

The analyses of law cases have, on the other hand, generally been based on judicial opinions of appellate courts with some reference to the printed record. A student studying a reported case would find it difficult to go behind the record to ascertain facts not there reported. The suggestion here made is that, at least from the procedural point of view, and probably from the point of view of ultimate justice in the case, a factual study based on the printed record is incomplete, and what is needed is the study of the parturition of the record. Only from such a detailed study of the facts behind the record, it is submitted, can one make a real judgment with regard to the efficacy of the procedure involved in a particular piece of litigation or the justice of the result arrived at.

The case involved the sale of the Hotel Beverly located on the northeast corner of 50th Street and Lexington Avenue in the City of New York. The hotel was owned on October 5, 1951, by a corporation known as the Beverly Hotel, Inc., the stockholders of which were a group of people who had associated themselves with the project in 1927 when the hotel, a large 25-story edifice, was constructed.

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Subsequent to the construction of the hotel, it had gone through the usual vicissitudes following the depression in 1929 and the ultimate recovery therefrom. To safeguard its access to light on the west side, and for a possible expansion of the hotel, an apartment house directly west of the hotel and adjacent to it, known as the Randolph Apartments, was acquired. This apartment house was acquired by a corporation called the 131 East 50th Street Corporation, the stockholders of which were some, but not all, of the stockholders of Beverly Hotel, Inc.

The events involved in the litigation began on October 5, 1951, when a real estate broker approached the president of Beverly Hotel, Inc., with the suggestion that he would like to arrange for the sale of the hotel. The conversations which took place between the real estate broker and the president of the hotel company were reported differently by the parties thereto, and hence cannot be considered as established facts. But, regardless of what the conversations were, three documents resulted therefrom. One was a letter addressed by a proposed purchaser to Beverly Hotel, Inc.; the other was a letter by the hotel company to the proposed purchaser; and the third was a letter by the real estate broker to the hotel company. Inasmuch as the entire case revolved to a large extent about the interpretation of these letters, they are set forth in full below with appropriate identification.[1]

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[1] EXHIBIT "A"

October 5, 1951.

Mr. Moses Ginsberg,
80 Broad Street,
New York City.

Re: 557-65 Lexington Avenue
125-41 East 50 Street

Dear Sir:

As requested by you I herewith hand you a check in amount of $25,000.00 to the order of Beverly Hotel Inc., as a partial deposit for the purchase of the above properties, for the sum of $2,150,000 for cash above the existing mortgages.

Formal contract which is to be the usual Title Guarantee & Trust Co. form is to be submitted some time next week and to provide for closing of title in 90 days or sooner.

Very truly yours,

Irving Maidman

Encl. check
Accepted and Approved:
Beverly Hotel, Inc.

Attorneys for the hotel company and attorneys for the purchaser immediately after the 5th of October, began consultations for the purpose of drafting the contract of sale. The president of the hotel company called a meeting of his directors for the purpose of approving the proposed contract.

EXHIBIT "B"

125 East 50 Street,
New York, New York,
October 5, 1951.

Mr. Irving Maidman,
1501 Broadway,
New York, New York.

Dear Sir:

Received from Mr. Irving Maidman this day Twenty-Five Thousand and oo/100 ($25,000.00) Dollars as a partial deposit for the good faith in the sale to you of the Beverly Hotel, 125 East 50th Street, New York, New York; and the apartment building 131-141 East 50th Street, New York, New York; known as the Randolph Apartments, for the sum of $2,150,000 (Two Million One Hundred Fifty Thousand and oo/100), all cash above the existing first mortgages on the Hotel and apartment house.

It is understood that we are selling you the capital stock of the 131 East 50th Street Corporation for Six Hundred Fifty Thousand and 00/100 ($650,000.00) Dollars and the Beverly Hotel for the sum of One Million Five Hundred and 00/100 Dollars ($1,500,000.00), which will make a combined total of Two Million One Hundred Fifty Thousand and 00/100 ($2,150,000.00) Dollars.

Contracts shall be made during the coming week with the closing of title to take place in ninety (90) days or sooner, seller's option.

Yours very truly,

BEVERLY HOTEL, INC.,
By Moses Ginsberg
Moses Ginsberg,
President.

EXHIBIT "C"

October 5, 1951.

Beverly Hotel, Inc.,
125 East 50th Street,
New York, New York.

This is to certify and it is hereby understood that the commission on the sale of the Beverly Hotel and the Randolph Apartments will be Twenty-two thousand Five Hundred and 00/100 ($22,500.00) Dollars.

It is further understood that if the sale, for any reason whatsoever, will not be consummated, I will not demand any commission.

It is also understood that there are no other brokers in this sale.

VICTOR SPITZER
Victor Spitzer
51 East 42nd Street,
New York, N. Y.

In addition to the foregoing there was also delivered to the hotel company a check, referred to in the letters, in the sum of $25,000. This check and the endorsement appearing on the reverse side thereof are as follows:

It will be noted that at this point no document which had been signed had the approval of any attorney. The letters which were to form the stuff for the lawsuit had been drafted by laymen.

At the directors' meeting, those directors who represented stockholders of Beverly Hotel, Inc., not interested in the adjacent property, the Randolph Apartments, objected to the allocation of the proposed purchase price between the Beverly Hotel and the Randolph Apartments, as indicated in Exhibit "B."

The first suit which was actually instituted was commenced by stockholders, voicing this objection, to impress a trust upon the Randolph Apartments in favor of Beverly Hotel, Inc., upon the theory that the stockholders and officers of Beverly Hotel, Inc., who acquired the Randolph, did so in violation of their duty to acquire the apartment structure for

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CHECK

IRVING MAIDMAN
1501 Broadway

440
1-33
210

New York October 5, 1951 No. 1015

Pay to
order of Beverly Hotel Inc. ——————————— $25,000.00/100 Dollars

THE HANOVER BANK
Avenue of the Americas at 35th St.
New York

Irving Maidman

(Endorsement on reverse side of check)
Deposit subject to contract for purchase
of 557-65 Lexington Ave.
125-41 East 50 Street
as per letter dated October 5, 1951 to
Moses Ginsberg

For Deposit only
Beverly Hotel Inc.
Pay to the order of
Any Bank, Banker, or Trust Co.
or Through the
New York Clearing House
Oct. 8, '51
Oct. 9, '51
Chemical Bank & Trust Company
(Bank Stamps)

the benefit of the Beverly Hotel, Inc., and thus passed up a corporate opportunity.[2]

As soon as this suit was started, the president of Beverly Hotel, Inc., renounced the contract of sale with the purchaser and attempted to return the $25,000 earnest money. The purchaser refused to accept the return of the fund and instituted a suit for specific performance. At the same time the broker instituted a suit against the president of Beverly Hotel, Inc., personally, to recover $22,500 on an alleged promise to pay brokerage.

Thus, an apparently harmless exchange of letters between two businessmen, who failed to consult counsel, resulted in the institution and maintenance of three major bits of litigation.[3] It is the history of these three cases, all of which were interwoven, that forms the subject matter of this paper.

II. The Suit for Specific Performance

The complaint in the action for specific performance joined as defendants Beverly Hotel, Inc., the president of the company, and a Mr. Samuel A. Telsey, a stockholder and officer of the hotel company, as well as of the 131 East 50th Street Corporation. It alleged, in substance, (1) that the defendants were the owners of the Beverly Hotel and of the stock of a corporation owning the adjacent property; (2) that on October 5, 1951, a contract had been entered into whereby the defendants agreed to sell, and the plaintiff agreed to purchase, the afore-described real property, and personal property consisting of the stock of the two corporations referred to, for the sum of $2,150,000, of which the sum of $1,500,000 was allocated to the hotel property, and $650,000 was allocated to the capital stock of the 131 East

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[2] The doctrine of corporate opportunity is, of course, a well-settled principle of corporate law. Generally, the rule is that a corporate officer or director may not seize for himself an opportunity for profit which is available to the corporation and which comes to him by virtue of the fact that he is an officer or director of the corporation. See Irving Trust Co. v. Deutsch, 73 F. 2d 121 (2d Cir. 1934); 3 Fletcher, Cyc. Corporations 268 (Perm. ed. 1947).

[3] An exciting analysis of hitherto untapped sources of law is contained in the paper by Professor Cavers of the Harvard Law School. See Cavers, *Legal Education and Lawyer-Made Law,* 54 W. Va. L. Rev. 177 (1952).

50th Street Corporation; (3) that the plaintiff had paid $25,000 as part of the purchase price; (4) that the plaintiff was ready, willing and able to perform and pay the balance of the purchase price, but that the defendants had refused to perform, and that unless a decree of specific performance was granted, the plaintiff would suffer irreparable injury. In the alternative, damages in the sum of $300,000 were asked.

The defendants appeared by two attorneys, denied the execution of a contract and the ownership of the stock of the corporation owning the adjacent property, and affirmatively pleaded the statute of frauds. A bill of particulars, served pursuant to demand, set forth that the contract sued upon was in writing and consisted of Exhibits "A" and "B," plus the check previously set forth.

With the record in this state, the defendants moved for summary judgment pursuant to Rule 113 of the Rules of Civil Practice. The application for summary judgment was bottomed on an affidavit made by the president of Beverly Hotel, Inc. It asserted broadly that the writings referred to in Exhibits "A" and "B" and the check were inadequate, in that essential elements of the contract were omitted, and that, therefore, the contract was void by virtue of the statute of frauds.

In support of this claim, the affidavit pointed out that Exhibits "A" and "B" contemplated the execution of a formal contract, and both referred to the check of $25,000, delivered on the signing of the letters, as "a partial deposit." It was also pointed out that the capital stock of the corporation owning the adjacent property was to be sold for $650,000, and that no disposition had been made of the debts of the corporation, which it was alleged totalled approximately $80,000. It was also charged that nothing was said in the letters about the furniture in the hotel, and that this was an extremely important matter to be disposed of in the proposed formal agreement. Counsel produced in court drafts of the formal agreement which showed that a variety of matters had been considered between the parties, and that no agreement had been reached with respect thereto, particu-

larly as to the amount of earnest money to be paid at the signing of the contract.

The answering affidavits submitted by the purchaser claimed that Exhibits "A," "B" and the check were sufficient on their face to constitute a complete contract, that nothing had been said about further earnest money to be paid at the signing of the formal contract, that nothing had been said about the furniture in the hotel, and that if the corporation owning the adjacent property owed any debts, this was news to the purchaser since the inference was that there was no other indebtedness.

The defendants, in support of the application for summary judgment, relied upon the decision by the Court of Appeals in *Ansorge v. Kane*,[4] in which it had been held that failure to agree upon the amount to be paid at the signing of the contract was an important element of the contract, and that if that item had been left open, there never was a complete contract in writing as required by the statute. The plaintiff, in opposition, argued that *Ansorge v. Kane* was not applicable since in that case the amount of earnest money was specifically left open, whereas they claim that in this case nothing was said about earnest money and that the phrase "partial deposit" meant payment on account.

The motion for summary judgment came on to be heard in Special Term and was there disposed of by Mr. Justice Walter whose essential finding and determination was that *Ansorge v. Kane* was not specifically applicable because there the sum to be paid on the signing of the contract was expressly left for future determination, and that, on a motion for summary judgment, it could not be held that the memoranda were inadequate, although they might be found to be so at a trial.[5]

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[4] 244 N. Y. 395, 155 N. E. 683 (1927).

[5] "Motion by defendants for summary judgment dismissing complaint in action to compel specific performance of alleged agreement to sell one parcel of real property and the stock of a corporation which owned another parcel of real property is denied. The writings in this case identify the buyer and the seller, the property and the price, and state that the price above existing mortgages is to be paid in cash. They also acknowledge receipt of $25,000 on account and state that title is to be closed in ninety days or sooner at seller's option; and they bear the signature of the corporate defendant and the signature of one of the individual defendants. They consequently are upon their

The defendants appealed to the Appellate Division and, on this appeal argued, in addition to what was said below, that there was no contract had between the parties because Exhibit "A," the letter from the purchaser, was never accepted by the seller, and Exhibit "B," the letter from the seller containing different terms, at best a counter-offer, was not accepted by the purchaser.

The Appellate Division unanimously affirmed Mr. Justice Walter in an opinion which expressed the view that the words "partial deposit" did not mean necessarily what their plain import seems to signify, and that on an application for summary judgment, where the appellant submits another interpretation of these words, he is entitled to a trial to determine whether or not that other meaning so suggested was intended by the parties.[6]

This holding, of course, flies in the face of elementary principles of jurisprudence. Long, long ago it was established in the law of contracts that the actual intent of the parties to a contract never governs their relations.[7] The only intent that governs the relations of parties is the intent made manifest by the words used. The phrase "partial deposit" has a definite meaning. It can mean nothing else than that

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face a sufficient compliance with the statute of frauds. Ansorge v. Kane (244 N. Y. 395) is not to the contrary, because the writing there contained the express statement 'the sum to be paid on signing of contract on March 26th to be agreed upon,' and thus showed upon its face that a material element had been left to future negotiation. It may be that a trial will show that there was in fact a failure to agree upon some essential term, as, for example, whether or not furniture in the hotel was included, or whether or not there was to be a further cash payment upon the signing of the formal contract of sale which plainly was contemplated. But there is at least no present showing that any essential term was left to future negotiation, and that is sufficient to require denial of this motion. Order signed." 127 N. Y. L. J. 244, col. 4 (Sp. Tr. Pt. III Jan. 18, 1952).

[6] "Order unanimously affirmed, with $20 costs and disbursements to respondent. For the purpose of this appeal it sufficiently appears that the minds of the parties met in writing on the basis that title was to close in ninety days or earlier, at seller's option, for a purchase price of $2,150,000 to be paid all cash above the existing mortgages unless the parties, in the meantime, by a more definite contract agreed otherwise. In any event, there would be a triable issue concerning whether the use of the words 'partial deposit' does not refer to payment on account of purchase price rather than an additional amount of deposit on the execution of the contract. (Callahan, J., concurs in result upon the ground last stated above.) Order filed." Maidman v. Beverly Hotel, Inc., 279 App. Div. 1050, 113 N. Y. S. 2d 259 (1st Dep't 1952).

[7] See 1 WILLISTON, CONTRACTS §§ 94 *et seq.* (Rev. ed. 1936).

an additional deposit is contemplated by the parties; and if such additional deposit was contemplated, the contract fell afoul of the statute of frauds. What the Appellate Division held in effect was that the actual intent of the parties could be proved at the trial, even though the language used was not ambiguous.

Another point which should be made is that the defendant Telsey, whose name was not mentioned in the memoranda and who was in no way connected with the transaction, as far as the written document was concerned, and who asked for summary judgment on his own behalf, received no consideration either from the court below or from the Appellate Division.

After the determination by the Appellate Division the defendants, who did not wish to have their status remain long in doubt, determined to end the litigation by consenting to the sale. Accordingly, the defendants improvised procedure and moved at Special Term for an order permitting them to withdraw their answers on condition that judgment be entered against them in favor of the plaintiff, granting plaintiff's prayer for specific performance, and on the further condition that the plaintiff be required to take the title to the real property and accept delivery of the stock within thirty days and to pay the consideration stipulated.

The affidavit in support of this application set forth the following facts: that this action was commenced by the plaintiff for specific performance of an agreement to purchase real property plus the stock of a corporation owning real property; that the action was predicated on several written memoranda; that theretofore the defendants had taken the position that these memoranda, because of the statute of frauds, were inadequate, but that the Appellate Division had held that the memoranda were sufficient and adequate to justify a trial of the facts; that the corporation owning the Randolph Apartments had extensive debts of approximately $80,000; that counsel for the plaintiff had told the Appellate Division that if there were such debts, presumably the purchaser would have to take the stock subject to them; [8]

[8] "The first reference to alleged debts of the corporation was made by

and that accordingly, the defendants, having no desire to go to trial, were perfectly willing to withdraw their answers on condition that the plaintiff be required to enter the judgment, accept the conveyance of the real property and the transfer of the stock of the corporation owning the adjacent property, pay the consideration therefor, and take the stock referred to subject to the debts of the corporation.

Strangely enough, at *nisi prius* the plaintiff opposed this motion and sought a trial. The grounds of the opposition were that the motion was in fact an offer of compromise but was not made pursuant to the provisions of Section 177 of the Civil Practice Act.[9] Secondly, plaintiff argued that the agreement to purchase the stock of the corporation owning the Randolph Apartments was a mere matter of form, but that in reality they had agreed to purchase the real property. And thirdly, if the plaintiff were compelled to take the stock of the corporation subject to the debts of the corporation, he would in effect be compelled to pay $80,000 more for the property than was contemplated by the memoranda.

Mr. Justice Steuer, however, granted the motion upon the conditions set forth in the moving papers, stating that:

. . . It is difficult to see what greater or different relief the plaintiff can get in this action than what he asks for in his complaint. He cannot have the court divide up the purchase for him or have the court make a new contract term for the corporate debts where it is admitted that no such term was made by the parties and where his complaint was upheld on the theory that none was necessary. The defendant consenting, he should conclude his action either by entering judgment or discontinuing. The motion is granted. The plaintiff is

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appellants in their moving affidavit when Moses Ginsberg stated upon information and belief that the corporation has certain debts to creditors. We submit this does not present any legal obstacle. The only debts referred to by the parties were the mortgages on each parcel of property. Hence whether or not the corporation had other debts whether in the sum of $1.00 or $80,000 is something entirely outside the scope of the agreement. Respondent does not now know the truth of the matter, and is not now precluded by the mere statement in the affidavit. If upon the trial it should prove true that there are some other debts beyond the mortgages and since respondent agreed to purchase the stock without any representations, he would presumably be obligated to take the stock subject to such debts." Brief for Respondent, p. 15.

[9] This section was in no way involved in the application, and counsel for the purchaser did not on the appeal urge this objection to the motion. It deals merely with consents to judgment as affecting costs after a trial.

directed to enter judgment on or before July 2, 1952, or discontinue his action. Failing either, the complaint will be dismissed.[10]

At this point there is the odd situation in which the defendants are offering to consent to judgment in favor of the plaintiff as prayed for in the complaint, but the plaintiff is opposing this effort and refusing to take the judgment on the ground that the proposed judgment imposes conditions more onerous than he contemplated when he executed the memoranda of sale and purchase. It will also be noted that at *nisi prius* all that the plaintiff asked was that the motion be denied and that a trial be ordered. He did not ask for summary judgment; he did not ask that he be given a judgment against the defendants granting him specific performance of the contract to sell the real property and the stock free of any corporate indebtedness. He merely asked for an opportunity to show that he was entitled to this relief at a trial. The ruling by Mr. Justice Steuer denied him this opportunity and said that the complaint was consistent merely with the express language thereof, which indicated that the plaintiff was buying stock of a corporation, that no disposition was made of the corporate debts and that, accordingly, the plaintiff must take the stock as he found it.

It will be noted that Mr. Justice Steuer gave the plaintiff the alternative of entering the judgment in accordance with the complaint, discontinuing his action, or, in default of either, having his complaint dismissed. The plaintiff chose to enter the judgment, and did so on June 26, 1952. There was some dispute as to the terms of the judgment, but these were ruled upon by Mr. Justice Steuer and a judgment finally was entered. By its terms the plaintiff was directed to take title by September 5, 1952.

The plaintiff, however, decided to appeal not from Mr. Justice Steuer's order or judgment, but only from so much thereof as directed him to take title and accept the transfer of the stock subject to corporate debts as of September 5, 1952, and to so much of the order and judgment as fixed the date of the adjustments between the purchaser and the seller as at the date of closing, September 5, 1952.

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[10] 127 N. Y. L. J. 2397, col. 4 (Sp. Tr. Pt. I June 17, 1952).

Since it would be impossible for his appeal to be heard before October when the Appellate Division would reconvene, the plaintiff moved at Special Term for a stay of the judgment. This was opposed on the ground that Special Term did not have authority to stay judgment of the Supreme Court merely because an appeal was pending. Extensive papers were submitted in support of and in opposition to this motion for a stay. The defendants contented themselves merely with showing that Special Term had no authority to grant a stay, and accordingly, the court at *nisi prius* denied the motion "without prejudice to an application to the Appellate Division of the Supreme Court." [11]

Such an application was, of course, promptly made. The application was in the form of an order to show cause why a preliminary stay should not be granted, pending the argument of a motion for a stay which could not be heard until the court reconvened in October. Since this preliminary stay was signed by one of the Justices of the Appellate Division, it had the effect of automatically postponing the closing date fixed in the judgment made by Mr. Justice Steuer. It provided that the closing date be postponed for 30 days after the determination of the appeal from Mr. Justice Steuer's order and judgment.

Ultimately, the motion for a stay was granted on September 23, 1952, on condition that the appellant "argues or submits the appeal on September 30, 1952." [12] In the meantime, the defendants moved to dismiss the appeal in the Appellate Division. The basis of this application was set forth in an affidavit by the attorney for the defendants. This affidavit contained a brief history of the case down to the

[11] 128 N. Y. L. J. 313, col. 4 (Sp. Tr. Pt. I Aug. 26, 1952). The form of the application was for an order extending the time within which to close the title until after the appeal from portions of the judgment had been heard. In other words, a modification of the judgment was asked of from a judge who had not made the judgment. The matter was disposed of on the authority of Herpe v. Herpe, 225 N. Y. 323, 122 N. E. 204 (1919), where it was held that the trial court itself has no power to amend the judgment in a substantial way but that this can only be done on appeal. Authorities were collected to show that changing of the date of closing was a matter of substance. *Cf.* United Appraisal Co. v. Fuca, 250 App. Div. 739, 293 N. Y. Supp. 556 (2d Dep't 1937).

[12] 128 N. Y. L. J. 567, col. 1 (App. Div. 1st Dep't Sept. 23, 1952).

point where Mr. Justice Steuer's order and judgment were made and entered. It was pointed out in the affidavit that the plaintiff had appealed only from so much of the judgment and order as put a burden upon him, but was perfectly willing to accept the benefits thereof. The attention of the court was directed to determinations holding that where an appellant accepts the benefit of an order, he may not appeal from its burdens. This is particularly true where the benefits are conditional upon the burdens, as was the fact in this case.[13] The attention of the court was called specifically to the case of *Mason v. United Press.*[14] In that case, a judgment was entered by default. Thereafter, a motion was made to open the default and vacate the judgment. The motion was granted. The plaintiff appealed from so much of the order as refused to direct that the judgment stand as security. In that case, the Court stated that:

> . . . [N]o question [is] presented on this appeal . . . the plaintiffs have not seen fit to appeal from the order setting aside the judgment and opening the default. The determination as to the terms imposed by the court as a condition for opening the default could only be reviewed by a direct appeal from the order which imposed them, and such an appeal has not been taken.[15]

This motion, of course, was crucial to the defendants' position. The plaintiff, in opposition to it, set forth nothing of substance which would in any way justify the taking of this appeal. In a memorandum submitted by the plaintiff in opposition to the motion, it was argued that the burdens and benefits of Mr. Justice Steuer's judgment were not conditional, and reliance was placed upon cases holding that one could appeal from a part of a judgment even though he had accepted the benefits of the unappealed portion of the judgment, where the two parts were independent of each other, and in no way conditioned one upon the other.[16]

It is very doubtful whether the court considered the merits of this application, because the only decision that was

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[13] Knapp v. Brown, 45 N. Y. 203 (1871).
[14] 51 App. Div. 473, 64 N. Y. Supp. 621 (1st Dep't 1900).
[15] *Id.* at 474, 64 N. Y. Supp. at 621.
[16] Goepel v. Kurtz Action Co., 216 N. Y. 343, 110 N. E. 769 (1915).

made was a memorandum which read as follows: "Motion in all respects denied, upon condition that the appellant argues or submits said appeal on September 30, 1952." [17] Inasmuch as the court had already ordered the appeal to be heard on September 30, 1952, and inasmuch as this motion had nothing whatever to do with the time in which the appeal was to be heard, but dealt solely with the propriety of the appeal, it may perhaps be inferred that no decision on the merits was made. One wonders whether any of the justices read the papers involved. Certainly, the memorandum would not indicate that any one of them had done so. A determination had to be made as to whether the burdens and benefits of Mr. Justice Steuer's judgment were independent or conditioned one upon the other. This the court failed to do.

A practical lesson is learned from this experience. It is that a motion to dismiss an appeal on grounds which are not commonly heard by the court, should be reserved until the argument of the appeal, and not made by way of motion before the appeal is heard, since an appellate court does not have time to consider motions very carefully, and when they see a motion to dismiss they assume, probably without reading, that it is to dismiss for failure to prosecute, because that happens to be the motion so frequently before them.

The appeal from a portion of Mr. Justice Steuer's order and judgment came on to be heard before the court, and briefs were filed by both sides and extensive argument took place before the court. The appellant did not deal with the problem which was again pressed by the respondent, namely, that the appeal would not lie at all because the plaintiff could not accept the benefits of an order while rejecting the burdens which were made a condition of the granting of the order.

The appellant maintained that the order and judgment, as far as appealed from, should be reversed because a fair construction of the memoranda would indicate that, while in form the purchaser contracted to acquire stock of a corporation, in reality, the deal was to acquire real property and that, therefore, Mr. Justice Steuer erred in insisting that the

[17] 128 N. Y. L. J. 567, col. 1 (App. Div. 1st Dep't Sept. 23, 1952).

purchaser take the stock of the corporation owning the Randolph Apartments subject to the debts of the corporation. The appellant also urged that the adjustments on the closing of title should be as of a date not later than 90 days after October 5, 1951, it being the contention of the appellant that the defendants had defaulted during that period and that, therefore, the profits earned after January 5, 1952 should belong to the purchaser. In fact, this second argument involved the disposition of approximately $100,000 in profits earned during that period.

The respondents in their brief to the Appellate Division, in addition to pressing the point in regard to the propriety of the appeal, urged strongly that on this appeal the court could not give summary judgment to the plaintiff; that the plaintiff below had only sought a trial of the issues of fact, but that here the plaintiff was seeking a determination of the issues of the trial, when the court itself had previously held that issues of fact remained on the memoranda which would require a trial. Moreover, the respondents stressed the fact that the plain language of the memorandum showed that what the purchaser was buying was stock in a corporation, and not real property. The attention of the court was called to the fact that appellant's counsel, himself, had on the prior appeal from the order denying summary judgment, conceded that if there were debts due from the corporation, the purchaser would have to assume them.[18]

With regard to the second point concerning the date upon which the adjustments should be made, the respondents had a weaker case for, by withdrawing the answer, the respondents had conceded their default, and hence were presumably obligated to convey not later than January 5, 1952. But the point was made that if the adjustments were to be as of January 5, 1952, then at least the sellers were entitled to interest on the purchase price from that date;[19] and it was pointed out that the appellant, while asking for an earlier date for adjustments, had not offered to pay interest

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[18] See note 8 *supra.*

[19] *But see* Lynch v. Wright, 94 Fed. 703, 704 (C. C. S. D. N. Y. 1899); Bostwick v. Beach, 103 N. Y. 436, 445, 9 N. E. 41, 43 (1886); Worrall v. Munn, 53 N. Y. 185 (1873).

on the purchase price. Under these circumstances, the argument was that the adjustment date was in the discretion of the court, and the court at *nisi prius* having exercised the discretion, it should not here be reversed.

The disposition of the case by the Appellate Division was a sort of compromise not based on any discernible principle of law. The appellant was given his summary judgment and relief from the responsibility of paying the corporate debts; but the respondents were given the adjustments as of September 5, 1952. The cash benefits to the purchaser were, therefore, offset by an almost identical cash benefit to the sellers. Mr. Justice Breitel dissented, he being the only one who stressed the principle of law that the appellant should not have the benefit of a conditional judgment without the conditions.[20]

The subsequent history of the case indicates, of course, that the whole litigation was, from the point of view of the litigants, no more than a sheer waste of time as well as being quite costly. No issue of law was ever determined by the

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[20] The opinions of the court follow:

"*Per Curiam:* Plaintiff, buyer, sued defendants, sellers, for specific performance of a written contract for the purchase and sale of a hotel at 125 East 50th Street, New York, N. Y., and an apartment building at 131-141 East 50th Street, New York, N. Y. On October 5, 1951, by letter, plaintiff made an offer with a part payment of $25,000 'for the purchase of the above properties for the sum of $2,150,000.00 for cash above the existing mortgages.' A formal contract, which was to be the usual Title Guaranty & Trust Company form, was to be submitted providing for 'closing of title' in ninety days. On October 5th, defendants deposited the $25,000 check indorsing it 'subject to contract for purchase' of the two properties 'as per letter dated October 5, 1951 to Moses Ginsberg.' On the same date, defendants wrote plaintiff a letter, the first paragraph of which acknowledges the deposit of $25,000 for the sale to plaintiff of the hotel and the apartment building 'for the sum of $2,150,000 * * * all cash above the existing first mortgages on the Hotel and the apartment house.' The second paragraph of the letter provided that defendants were selling the capital stock of 131 East 50th Street Corporation (the apartment house) for $650,000 and the hotel for $1,500,000 'which will make a combined total of * * * $2,150,000' and referred to contracts to be made 'with the closing of title to take place in ninety (90) days or sooner' at sellers' option.

"After denial of defendants' motion for summary judgment and affirmance of such denial by this Court (*Maidman* v. *Beverly Hotel,* 279 App. Div. 1050) defendants moved at Special Term for leave to withdraw their answer and to enter judgment in plaintiff's favor granting plaintiff's prayer for specific performance on condition that plaintiff be required to take title to the premises and accept delivery of the stock within thirty days 'upon the payment of the consideration referred to in the memoranda * * * sued upon.' Plaintiff was ready to pay the consideration mentioned in the memoranda sued upon, to wit,

courts in this case, and a rough and ready justice was applied throughout. Of course, the respondents might have appealed as of right to the Court of Appeals, but this was obviated by concessions made to the respondents by the appellant. These concessions further postponed the date of adjustments to the

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$2,150,000 above the mortgages but defendants insisted that plaintiff should take the capital stock of the apartment house subject to its debts (which appear to be in excess of $80,000) and pay defendants such debts in addition to the $2,150,000 agreed upon. Special Term granted judgment in accordance with defendants' request. Plaintiff appeals.

"We construe the contract as a real estate transaction in essence as to both properties and not a purchase and sale of stock as such. The stock transfer was only the vehicle for effecting a transfer of the title to the apartment house. The written contract is clear that the purchase price to be paid by plaintiff was $2,150,000 all cash 'above the existing mortgages', not such amount above mortgages plus undisclosed corporate indebtedness without limitation. The form of title transfer at defendants' request did not change the total consideration both parties agreed upon to be paid, namely, $2,150,000 all cash above existing mortgages.

"In other respects the form of the judgment entered shows that Special Term did not treat the matter as a stock deal but essentially as a sale of real estate.

"We think plaintiff is not conclusively bound by the isolated statement in the argument of plaintiff's counsel on the prior appeal to this court. The whole context indicates that plaintiff insisted he was not to pay above the agreed $2,150,000 over the mortgages and that the real issue was whether, as a matter of law, the terms set forth in the documents were sufficient to make out a valid enforcible contract. The parties are in equity and on defendants' motion to withdraw their answer and enter judgment in plaintiff's favor for specific performance of the contract sued upon, equity and fairness require the result herein indicated.

"Under the circumstances of this case, we think the date for adjustments at the closing of title was in the discretion of the court and the date fixed by Special Term should not be changed.

"The judgment appealed from should be modified by deleting therefrom the provision that plaintiff is obliged to accept the stock of the 131 East 50th Street Corporation subject to the bona fide debts of the corporation on October 5, 1951, and, as so modified, affirmed, with costs to plaintiff-appellant.

[All concur but Breitel, J. who dissents.]

"Breitel, J. (dissenting). I dissent on the ground that it cannot be determined on the documents alone that the buyer was to take title through the stock of the holding corporation free of the corporate debts. Either the judgment should be affirmed because of the tactical situation into which plaintiff put himself—in order to overcome the defense of the Statute of Frauds—or at the least, in the interests of equity, if the judgment is to be modified it should be vacated entirely, leave should be granted defendants to reinstate their answer, and a trial should be had. Upon such a trial the issue as to the intention of the parties with respect to the corporate debts may be determined, and then too the applicability of the Statute of Frauds could be likewise determined. Defendants withdrew their answer conditionally. We may not remove the condition and let the withdrawal stand. Nor may we rewrite the written documents of the parties to accord with what we think they should have written had they had the benefit of legal advice at the time." Maidman v. Beverly Hotel, Inc., 280 App. Div. 925, 116 N. Y. S. 2d 311 (1st Dep't 1952).

actual date of closing, which did not take place until December 1, 1952, increased the purchase price by the assumption by the purchaser of half the brokerage commission, accepted the transfer of the stock without guarantees of the payment of indebtedness by the corporation, and made numerous other less material concessions designed to render further appeal unprofitable.

Naturally, in such a litigation many inarticulate major premises, which did not appear in the papers, were present and dictated the conduct of the parties. The fact that the president of Beverly Hotel, Inc., who had negotiated this deal, is a gentleman close to 80 years of age, who had suffered some physical disability during the year, and was, therefore, not considered physically equal to the strain of a trial, was the primary motive for invoking the summary jurisdiction of the court. The fact that the purchaser is an experienced hotel operator, who saw hidden and unrealized profits in the operation, led him to a willingness to make concessions to acquire the property. He might otherwise have abandoned the transaction entirely. The disagreements among the stockholders of Beverly Hotel, Inc., also furnished additional impetus to the consummation of the trade at the earliest possible moment. Thus was averted the pressure of the stockholder suit and of the broker's suit for commission. It is submitted, however, that what emerges most clearly is the archaic nature of the procedure here involved—a procedure provided for in the Civil Practice Act, and utilized by the lawyers to the full extent. One closes the papers in this case with a feeling of absolute certainty that, regardless of what actually happened, the one thing that is unknown is the justice of the case. Lawyers were permitted, without rebuke, to make one interpretation of a contract on one day, and a wholly different one on the next. Judges indulged in the luxury of the refusal to pass on points strongly urged for consideration. In the end, the parties had to make a new agreement for themselves, which they might have done at any time without going to court at all, and without attempting to defend the rights they already had. The courts in the case acted not as an agency for the determination of dispute in accordance with the principles of natural law, but

as a goad to compel the parties to get together. In this aspect the courts were, of course, eminently efficient and successful. That phase of the judicial process, however, has been too infrequently noticed by juristic commentators.

III. The Broker's Suit

As soon as it appeared that the transaction involving the sale of the real properties in question might fail to be consummated, the broker instituted a suit against the president of Beverly Hotel, Inc., personally to recover the sum of $22,500. This suit was commenced by the service of an ordinary summons without a complaint and named as defendant only Moses Ginsberg. Within one day after the service of the summons the defendant appeared by his counsel. The plaintiff, therefore, had twenty days under the code sections within which to serve the complaint. However, for reasons unknown and not made manifest, the time to serve the complaint was extended first to December 28, 1951, then to January 2, 1952. The complaint actually arrived at the office of the attorney for the defendant on January 3, 1952.

In the complaint the plaintiff alleged that he was a licensed real estate broker; that Beverly Hotel, Inc., was a New York corporation and owned the real property known as the Hotel Beverly; that the defendant Moses Ginsberg was a stockholder, president and director of Beverly Hotel, Inc.; that 131 East 50th Street Corporation was the owner of real property located at 50th Street adjacent to the Beverly Hotel; that the defendant was stockholder, officer and director of that corporation; that in September, 1951 the plaintiff was employed by the defendant to procure a purchaser for the Beverly Hotel as well as for the capital stock of 131 East 50th Street Corporation; and that the defendant agreed to pay the plaintiff $22,500 commission; that the plaintiff procured such purchaser and that the contract of sale had been entered into, and that the defendant has refused to pay the commission.

The defendant promptly answered the allegations of the complaint and denied that he had made any agreement with the plaintiff whatever. Pursuant to a demand for a bill of

particulars the plaintiff served his bill in which he said that the agreement between him and the defendant was oral, whereas an agreement of sale was in writing and consisted of the two letters, Exhibits "A" and "B," which have heretofore been quoted, and no reference whatever was made either in the complaint or in the plaintiff's bill of particulars to Exhibit "C," the letter signed by the plaintiff and addressed to the Beverly Hotel, Inc., on October 5, 1951, the very date of the memorandum in which the plaintiff stated: "It is further understood that if the sale, for any reason whatsoever, will not be consummated, I will not demand any commission."

With the pleadings in this state, the defendant moved for summary judgment on an affidavit by a son of the defendant which set forth that that agreement between the plaintiff and the Beverly Hotel, Inc., was in writing and consisted of the letter, Exhibit "C," referred to above and dated October 5, 1951, and that by its terms no commission was to be paid or demanded if the deal was not consummated. The affidavit stated that the reason why it was being made by the defendant's son instead of the defendant, was because defendant's son was present throughout the transaction and that the defendant would not be available to sign an affidavit because he would be out of the jurisdiction until May, 1952.

The answering affidavit of the plaintiff is a document of legal ingenuity. It started out with an aggrieved tone in which the plaintiff alleged that "he deeply" resented the statement in the moving papers that the cause of action was made out of whole cloth and for the purpose of avoiding the effects of his written agreement with Beverly Hotel, Inc. He expressed the opinion that the defendant himself would not have made such an affidavit but that only his son would do so. He protested that he has an honorable and respected name in the real estate profession and then refers to the moving paper as "undisciplined and typical."

It then proceeds to recount the history of his transactions with the defendant. He gives a day by day account of his visits to the defendant and his discussions with him. He understood, of course, that the property being sold did not belong to defendant but to two corporations in which the de-

fendant had an interest. He does not deny that he signed the letter stating that he would demand no commission if the transaction of sale was not consummated. He says, "As the defendant dictated this letter I protested about the language that he was using. After the typed letter was brought back and the defendant asked me to sign the letter, I asked him what the idea was and I said to him, 'You're not going to back out from your agreement to pay me the commission, are you?' He said, 'Of course not, dismiss it from your mind, just be sure that Maidman will conform to his part of the deal, that is all you have to worry about—if Maidman performs, I will pay you the commission.' "

There was no unequivocal statement in the answering affidavit that the defendant agreed to pay the commission out of his own pocket rather than as an officer acting on behalf of Beverly Hotel, Inc., and the other corporation. There was no explanation of why the plaintiff signed the letter disowning the commission if the deal was not consummated. He merely said that he protested the language but admitted signing the letter. The defendant, in presenting the court with the legal issues, attempted to make it appear that the principle of law involved is the doctrine of integration. The general rule sought to be applied was that where there exists a series of oral conversations ripening into an agreement, and the agreement is then reduced to writing, neither the oral negotiations nor the oral contract can be proved but the parties are bound by the writing and no parol evidence can be produced to vary it. An analysis of the answering affidavit was set forth in which it was shown that these negotiations finally ripened into a contract between the plaintiff and Beverly Hotel, Inc., and that this agreement was in writing and that accordingly, the oral agreement sued on could not be proved.[21] The difficulty with this position was that the plaintiff was not suing on any agreement with Beverly Hotel, Inc., but he was suing on an oral agreement with Moses Ginsberg, a separate entity. Even so, the better rule

[21] Wigmore states the rules as follows: "When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." 9 WIGMORE, EVIDENCE § 2425 (3d ed. 1940).

seems to be that where a transaction is covered by a written agreement, it may not be shown by parol that an agreement covering the same field with another party is in existence unless the written agreement can be explained away.[22]

The plaintiff likewise submitted a memorandum in opposition to the motion for summary judgment in which he attempted to show that where triable issues of fact existed, summary judgment could not be granted. Naturally, no dispute could be raised as to this principle of law and none was. The argument with respect to the so-called preclusive letter was simply (without citation of authority) that the letter was not a waiver.

The motion was disposed of by Mr. Justice Aurelio within a few days with the simple notation: [23] "Motion for summary judgment in favor of defendant is denied. Triable issues are presented." The court did not favor the parties with the determination of the legal problems presented. The precise issue that had been tendered to the court was whether summary judgment could be granted on the plea that the alleged issue of fact was completely incredible. To this there might be two answers in any particular case. The court might say, the story told by the plaintiff is not so incredible as to be impossible of belief, or it might have held that even though the story is completely incredible, nevertheless since it is contained in an answering affidavit, summary judgment cannot be granted. This was an opportunity for the clarification of that legal problem. The defendant, therefore, appealed to the Appellate Division.

In the Appellate Division essentially the same arguments were made as below with very little variation. No oral argument was had on the appeal because of inconvenience, and the determination of the court was made on the basis of the briefs and record without the benefit of oral

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[22] It proved impossible to find express authority for this "better rule" unless the criteria discussed in Mitchill v. Lath, 247 N. Y. 377, 380-81, 160 N. E. 646, 647 (1928), can be so interpreted. When a transaction has been embodied in a writing, oral negotiations leading up to it are necessarily inadmissible in evidence, not because of a rule of evidence, but because of a rule of substantive law. See 9 WIGMORE, EVIDENCE § 2425(1) (3d ed. 1940).

[23] 127 N. Y. L. J. 913, col. 7 (Sp. Tr. Pt. III March 6, 1952).

argument. The order of Mr. Justice Aurelio denying summary judgment was affirmed with one judge dissenting.[24]

The majority of the court which affirmed the order of the court denying summary judgment did say that the contentions of the plaintiff in explanation of the written exculpatory agreement seemed improbable, yet they held that on a motion for summary judgment it cannot be said that an issue of fact had not been raised. Thus an answer was made to one of the questions tendered to the court, the court adopting the rule that even an improbable story, sworn to in an answering affidavit, raises an issue of fact.

Mr. Justice Van Voorhis, who dissented, interpreted the exculpatory letter to apply to any one who might be obligated to pay the commission although it was addressed to Beverly Hotel, Inc. He did not in any way deny the legal proposition that even an improbable story contained in an answering affidavit, would be sufficient to defeat summary judgment. If one were to paraphrase the opinion of the majority, it might be stated like this:

The plaintiff is a real estate broker. The defendant is an officer of a corporation which owns real estate. The plaintiff and the defendant made an agreement whereby the plaintiff was to procure a purchaser for the real property. It was understood, however, that the owner of the real property would not pay any commission unless the

[24] "Order affirmed, with $20 costs and disbursements to respondent. We feel constrained, upon the present record, to affirm the order denying summary judgment. While the contentions of the plaintiff in explanation of the written exculpatory agreement may seem improbable, we do not feel that we can say, at this time, that no issue is raised with respect to the individual promises of Ginsberg, particularly in the absence of an affidavit by defendant himself. . . . Van Voorhis, J., dissents in the following memorandum: The complaint should be dismissed upon the ground that the action is premature before title has actually been closed, in view of plaintiff's statement in his letter dated October 5, 1951: 'It is further understood that if the sale, for any reason whatsoever, will not be consummated, I will not demand any commission.' Although this letter is addressed to Beverly Hotel, Inc., it refers by its terms to any commission which may be payable in connection with the transaction. Only one commission could be payable, since the contract of sale, if made, is entire. If defendant Moses Ginsberg assumed payment of the commission, the letter quoted indicates that it was intended to inure to Ginsberg's benefit. The order appealed from should be reversed and summary judgment granted to defendant dismissing the complaint, without prejudice to a renewal of the action in event that title to the real property in question is actually transferred to the purchaser procured by plaintiff." Spitzer v. Ginsberg, 279 App. Div. 1050, 113 N. Y. S. 2d 258 (1st Dep't 1952).

deal were consummated and that none would be demanded. However, the plaintiff says that, in addition to such understanding, which was in writing, there was also an oral understanding that the defendant personally would pay the commission out of his own pocket regardless of whether the transaction was consummated. This is an improbable story, but the plaintiff is entitled to a trial, and to have a jury tell him whether it is true or not.

The question is as to the degree of improbability. If a man swears that he can square the circle or make perpetual motion, does he raise an issue of fact sufficient to justify the denial of summary judgment; and similarly, if a person swears that a promise has been made, for which there was obviously no consideration even though one were alleged, is not the story just as unlikely and, therefore, completely incredible, and should it not be held that summary judgment cannot be defeated by such a tall tale? The opportunity which the court had for analyzing this problem and reaching a decision thereon was not availed of. The defendant moved for reargument or for leave to appeal to the Court of Appeals, and made the further point that it now affirmatively appeared that the purchaser was unwilling to consummate the transaction. Nevertheless the motion for leave to the Court of Appeals or for reargument was denied.[25]

The strategy of the plaintiff's case was to obtain a trial before a jury, the idea being that the jury would be sympathetic to the plaintiff's case, and the forensic skill of his counsel might bring a determination in his favor. The actual facts of the case seem not to be of great importance in this strategy as is revealed by the history of the application made by the plaintiff to examine the defendant before trial. In opposition to this motion, it was stated that the defendant, a man 80 years of age, resided in Florida during each winter and that it would be a hardship to compel him to come to New York at this time for an examination. Request was made that the examination be postponed, but the court paid no heed to this request and granted an examination before trial except with regard to one item. The item which was rejected by the court concerned the alleged unlawful and

[25] 127 N. Y. L. J. 2225, col. 7 (App. Div. 1st Dep't June 3, 1952).

wrongful refusal of the defendant to convey the property to the proposed purchaser, and, in spite of the fact that the contracts between the proposed purchaser and the proposed sellers were alleged to have been in writing, the court allowed a general examination before trial with respect to negotiations between the parties concerning the same.[26]

The defendant then moved pursuant to Section 288 of the Civil Practice Act for an order directing the testimony of the defendant to be taken by deposition at his home on the ground that he was too infirm to be able to attend the trial.[27] In spite of the fact that the defendant was 80 years of age and was indeed unequal to the task of appearing in court, the application was opposed on technical grounds, and suspicion was voiced that the plea of infirmity was not real. The plaintiff's counsel, opposing this motion, said privately that he was pressing for trial because he wanted to avoid the possibility of being unable to prove his case in the event of the death of the defendant.

The motion to examine the defendant at his home or office was granted,[28] and thereupon the plaintiff waived the examination before trial entirely. Apparently the plaintiff's attorneys had decided that they did not have to know in advance what the defendant would testify to at the trial, that they would simply have the plaintiff tell his story, and leave their destiny with the jury.

The case finally came on for trial; the defendant, however, having reached agreement with the purchaser, proposed adjournments of the case from time to time, all of which were opposed by the attorneys for the plaintiff. Finally, when negotiations with the purchaser were almost completed, the plaintiff refused to go to trial, hoping that he would get his commission upon the closing regardless of the merits of his suit against the defendant.

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[26] The scope of an examination before trial is often of utmost importance. Yet the cases are numerous and conflicting as to preclude intelligent generalization.

[27] N. Y. Civil Practice Act, Section 288, provides generally for the taking of depositions before trial or during the pendency of an action under certain circumstances including a situation in which a proposed witness ". . . is so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial . . . ."

[28] 128 N. Y. L. J. 725, col. 3 (Sp. Tr. Pt. I Oct. 7, 1952).

As indicated above, the purchaser assumed the payment of part of the commission and, at the closing which occurred on December 1, 1952, the broker agreed to accept a lesser amount than he had sued for, and received that lesser amount as the last act of a tiresome day's title closing.

The legal problems presented by this litigation had gone unsolved. The factual problems were avoided by settlement. The whole litigation was fantastically useless since the broker might have just remained quiet and would have received his full commission at the closing. By instigating this suit and making allegations which the defendant asserted to be false and which the Appellate Division called improbable, he created hostilities which led to reduction of his commission and incurred wholly unnecessary legal expenses. I think many lawyers would have so advised him.

IV. THE STOCKHOLDERS' SUIT

As indicated above, some of the stockholders of Beverly Hotel, Inc., owned no interest in 131 East 50th Street Corporation which owned the property adjacent to the Beverly Hotel. Attention has also been called to the fact that of the $2,150,000 purchase price, $1,150,000 was allocated to the hotel, and $650,000 was allocated to the adjacent property. The first complaint of the stockholders, who were not interested in the adjacent property, was that the allocation was unfair and that more should be allocated to the hotel and less to the apartment building. Subsequently, after consulting with eminent counsel, the position was taken by the dissenting stockholders that the acquisition of the adjacent property was a corporate opportunity and that, therefore, whatever profits were made on the sale of the property were trust funds for the benefit of Beverly Hotel, Inc. The complaint so alleged; the answer denied it. The litigation held promise of interest and was probably bottomed on dicta of *Irving Trust Co. v. Deutsch*.[29] However, the defendants were prepared to place their case upon the proposition that the financial inability of the corporation to acquire the property

[29] 73 F. 2d 121, 123 (2d Cir. 1934).

at the time the property was acquired, and the fact that the acquired apartment building was not competitive with the hotel, deprived the acquisition of the essential characteristics of a corporate opportunity. As the case was ultimately disposed of by agreement between the parties, no determination of these basic questions of law ever took place. But there was a struggle with respect to a bill of particulars, which is not without interest.

The defendant had served a demand for a bill of particulars. The demand contained eight items with respect to which additional information was requested. Instead of serving the bill of particulars, the plaintiff moved the court for an order (a) vacating the demand for a bill of particulars or, in the alternative, modifying or limiting its scope; (b) directing that if a bill of particulars is ordered, that it be not required to be served until ten days after the completion of the examination of the defendants and the signing of their testimony; and (c) directing that the defendants appear for examination with regard to eighteen items. Voluminous affidavits were submitted, both in support of, and in opposition to, this motion, but in accordance with the custom of the court, no oral argument was heard. The decision, which appeared in the Law Journal on the last day of the year 1951, was as follows:

Motion to vacate the demand for a bill of particulars is denied. The bill is to be served within ten days after service of the copy of this order, together with notice of entry thereof. If the plaintiff is lacking in knowledge as to any of the items he may so state under oath, and in that event a further bill is to be served within ten days after completion of the examination should the examination develop the required information. That branch of the examination before trial is granted except for Item 17. The individual defendants and the corporate defendant, by an officer or employee having knowledge of the facts, will appear for examination at Special Term, Part II of this court on January 10, 1952, at 11 A.M. All pertinent books, records and documents will be produced for use pursuant to Section 296, C. P. A.[30]

[30] 126 N. Y. L. J. 1808, col. 6 (Sp. Tr. Pt. I Dec. 31, 1951).

The important point raised on this application was whether or not an examination before trial of the defendant should precede or follow the bill of particulars to be served by the plaintiff. On the part of the plaintiff it was argued that the examination of the defendant should precede the service of the bill of particulars, the point being made that "since the purpose of a bill of particulars is to limit the plaintiff's claim, it is obvious that such limitation should not occur until I have had an opportunity to ascertain the precise facts, all of which facts have been denied to me." The motion was complicated by a misunderstanding between counsel as to an agreement which they had reached with respect to this very issue. An agreement was contained in a stipulation prepared by counsel for the defendant which remained unsigned because of the misunderstanding.

As to the question concerning which should come first, the bill of particulars or the examination before trial, the defendant argued that none of the matters referred to in the demand required any additional information.

The court resolved the issue, as we have seen, against the plaintiff, requiring him to serve a bill of particulars in advance of the examination before trial, at least to the extent that he was able to do so. Yet the position of the plaintiff was not without merit, in spite of the fact that suits based on suspicion of wrongdoing should not be encouraged.

In due course the plaintiff served a bill of particulars. As served, the bill contained a number of items with respect to which the plaintiff claimed that precise information was lacking to him. The defendant thereupon moved again, this time for an order of preclusion with respect to those matters concerning which the bill of particulars, as served, was inadequate.

In the affidavit in support of this motion, it was pointed out that most of the items in the demand were not complied with, the plaintiff claiming that he was without knowledge. The improbability of this claim was pointed out to the court. For example, one of the allegations in the complaint was that the defendants had suppressed certain information. Item 2 of the demand for a bill requested that the plaintiff state where, and in what manner, he became aware of these sup-

pressed and concealed facts. The bill of particulars with respect to Item 2 merely said "as stated in Paragraph 10 of the complaint." It was obvious that this did not give the information required in Paragraph 2 of the demand. It was also obvious that the plaintiff could not claim that he did not know when he became aware of suppressed facts. Likewise, Item 4 of the demand and Item 7 of the demand requested information which could only be known to the plaintiff. It was obvious that the plaintiff's claim in his bill of particulars that he had no information with respect to this could not be in accord with the facts. The affidavit in opposition to the motion to preclude did not explain why the plaintiff was unable to give the time and circumstances upon which he became aware of certain facts. Accordingly, the court granted the motion in part, as follows:

> Item 2 of the demand has not been properly complied with. The claim of lack of knowledge sufficient to comply with items 4 and 7 is inherently without merit, since the plaintiff is necessarily able to furnish the information required by those items. This motion is granted unless a further bill as to items 2, 4 and 7 is served within ten days from the service of a copy of this order, with notice of entry.[31]

The plaintiff thereupon served a proper bill of particulars giving the details requested.

The examination before trial, while it was commenced, was never completed. A settlement of the issues between the plaintiff stockholders and the defendants was ultimately arranged when it appeared that the sale would be consummated. By the terms of the settlement the sum of $75,000 was deducted from the purchase price of the apartment building and added to the purchase price of the hotel. This satisfied the plaintiffs, was agreeable to the defendants, and ended the litigation. However, it is regretful that the issues of law, which might have been determined in this litigation, never were determined by the court. The law of the case was made by the parties themselves, agreeing on a compromise of their differences of opinion. If one defines law as

[31] 127 N. Y. L. J. 699, col. 1 (Sp. Tr. Pt. I Feb. 20, 1952).

the rules by which people govern their conduct, this dispute was determined according to law. But law, properly so-called, is the force applied by the state through its courts for the disposition of conflicts. From that point of view the litigation was disposed of by an appeal to convenience rather than to law.

V. CONCLUSION

The purpose of this extended analysis of the foregoing transaction was to indicate the day by day steps taken in a comparatively simple litigation. Some conclusions appear obvious. One is that the litigation insofar as the court had anything to do with it, settled nothing; that in the end, the parties were compelled to adjust their disputes on the basis of commercial wisdom rather than juristic principles. The second is that the courts were effective in exercising pressure upon the parties to make the adjustment. The third proposition is that the nature of our procedure renders the innovation of procedural forms extremely risky and creates a possibility of miscarriage of justice. Judges, like most other people, are the victims of the habitual, and one strains at the judicial process not only by hard cases but by novel procedure.

It may be possible to verify these conclusions by analysis of other cases, or it may turn out that such an analysis is not fruitful. Time and experience will tell.